

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Dennis E. Daniels,

Petitioner,

v.

Minneapolis Community
Development Agency,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on May 9, 1995, at the Office of Administrative Hearings, 100 Washington Avenue South, in the City of Minneapolis, Minnesota. The record closed upon receipt of the final brief on June 13, 1995.

Karin E. Peterson, Esq., Gregg M. Corwin & Associates, 508 East Parkdale Plaza Building, 1660 South Highway 100, St. Louis Park, Minnesota 55416-1534, appeared on behalf of Petitioner, Dennis E. Daniels. John M. LeFevre, Jr., Esq., Holmes & Graven Chartered, 470 Pillsbury Center, 200 South Sixth Street, Minneapolis, Minnesota 55402, appeared on behalf of Respondent Minneapolis Community Development Agency ("MCDA").

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained in this recommended decision. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this recommended decision has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this recommended decision to file exceptions and present argument to the Commissioner. Parties should contact Gerald Bender, Department of Veterans Affairs, 200 Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether Petitioner's removal from his position was based upon a good faith abolition of his position.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner is an honorably discharged veteran entitled to the protection of the Veterans Preference Act. (Ex. 26.) He was removed from his position with MCDA effective February 3, 1995.

2. Petitioner was employed by MCDA from 1986 to 1995, first as Manager of Project Management (1986 - 1993) and then as Manager of Commercial Development (1993 - 1995). At the time of his layoff, Petitioner was considered a good employee and he had received an excellent performance review in 1994. His performance was rated as "consistently exceeds job requirements", which was the highest rating available. (Ex. 13.) At the time of his removal, Petitioner was receiving a salary of approximately \$65,000. He was 60 years old. (Ex. 17.)

3. Although Petitioner had also worked for MCDA's predecessor agency from 1962 to 1965 as a junior draftsman and junior planner, his date of permanent hire with MCDA was February 18, 1986, because he left the agency to work for the City of Bloomington for 19 years as a senior planner and as director of its HRA. (Exs. 13 and 18.)

4. Ann Calvert was Manager of Industrial/Mixed Use Development at the time of Petitioner's layoff. Calvert has occupied many positions during her employment with MCDA. She had become a supervisor in 1983 and a manager in 1993. She reported to Petitioner from 1985 to 1993. She had eleven years more seniority with MCDA than Petitioner, with a permanent hire date of March 17, 1975. (Exs. 14 and 19.) She was considered a good employee with substantial experience and had received an excellent performance review in 1994. Her performance was also rated "consistently exceeds requirements". (Exs. 14 and 15.) At the end of 1994, Calvert had a salary of approximately \$64,000. She was 42 years old. (Ex. 16.)

5. In late 1994, each division of the MCDA submitted its budget for approval. Petitioner submitted a budget for his division which included the funding for his position. Petitioner's proposed budget was approved on December 13, 1995.

6. Although they were in different positions, the duties of Petitioner and Calvert were similar at the time of Petitioner's layoff. Each job involved the performance of managerial work involving planning, directly, administering and monitoring the functions and activities of their respective departments. (Exs. 8 and 9.)

7. MCDA had been criticized during 1993 as being ineffective, wasteful and lacking focus. (Ex. 1.) The Agency commenced a strategic planning effort, in order to more clearly define MCDA's role, identify ways MCDA could become more effective and eliminate unnecessary or non-priority activities. (Ex. 7.) In anticipation of organizational changes within MCDA, the MCDA Board of Commissioners, on November 14, 1994, approved a staff recommendation concerning appointment by the executive director of key management and support staff and extension of the agency employment transition policy. This action paved the way for the new executive director to make necessary staff changes, and to provide certain benefit options to employees who might be laid off. (Ex. 2.)

8. Rebecca Yanisch ("Yanisch") became MCDA's Executive Director on November 28, 1994. She was nominated for the position by the Mayor and approved by the Executive Committee of the City Council. Her responsibility is the overall management and direction of MCDA, subject to the control of MCDA's Board of Commissioners and the Minneapolis City Council. MCDA is essentially the development arm of the City of Minneapolis. Yanisch had

previously worked as Finance Director for MCDA from 1992 to 1994. Yanisch assumed the position of Executive Director with an announced intent to make MCDA more focused, more accountable and more financially responsible. She sought to make the agency “smaller and smarter”. (Ex. 1.)

9. Yanisch started as Executive Director at a time of declining resources for MCDA’s development activities. The Mayor had called for the MCDA to be more efficient and had suggested shifting administrative overhead to be used instead to finance residential mortgages. (Ex. 28, p. 11.) Tax Increment Financing (“TIF”), historically used to fund MCDA’s development efforts, had been severely restricted as a financing tool by legislation. MCDA had already experienced and anticipated further sharp reductions in MCDA’s common project cash balances as is indicated in the following table:

(Ex. 3.) Since the agency's administration cost is paid from common project funds, declining resources made it advisable to reduce expenses where possible in order for MCDA to live within its means.

10. Shortly after she assumed her position, Yanisch implemented an internal re-organization with elimination of certain management positions. She decided to eliminate three management positions - Director of Finance, Manager of Multi-Family Housing and Manger of Commercial Development (Petitioner's position). (Exs. 4, 5.) She met with Petitioner in late November of 1994 to tell him that his position was being eliminated for economic reasons. She estimated that the savings from the elimination of these positions would be over \$200,000.

11. The old and new management structures at MCDA are as follows:

12. Yanisch decided to eliminate the Finance Division as a separate division, and to consolidate the finance functions within the remaining two major operating divisions, Housing and Economic Development. Therefore, the position of Director of Finance was eliminated. (Ex. 12.)

13. Two housing positions, Manager of Single Family Housing (Earl Pettiford) and Manager of Multi-Family Housing (Jim Gabler) were essentially consolidated, with the more senior manager assuming the duties of the new combined position. (Exs. 10 and 11.)

14. Petitioner's position, Manager of Commercial Development, was eliminated, and all of the duties were assigned to the former Manager of Industrial/Mixed Use, Ann Calvert. Calvert became Manager of Business Development, which is a combination of her prior job and the Petitioner's position. (Ex. 21.)

15. According to MCDA, Petitioner's position was eliminated for several organizational reasons. One was to continue to streamline MCDA's management structure and reduce expenses in view of shrinking resources available to the Agency. Furthermore, Yanisch believed that there were areas of overlap and a lack of clear-cut distinctions between Commercial Development and Industrial/Mixed Use Development. MCDA also anticipated a decrease in its downtown activities, which fell largely within the Commercial Development Department. Moreover, consolidation of these departments made it possible to train and utilize staff more efficiently within the overall business development function. (Exs. 8, 9, 21.)

16. Yanisch presented the proposed organizational structure (Ex. 5) with these changes to the MCDA Operating Committee on December 5, 1994. (Ex. 6.)

17. Petitioner was officially notified of his layoff in a letter dated December 15, 1994. It informed him, among other things, that

In an effort to better serve the MCDA's clients and further reduce the cost to manage given declining resources, it has been determined appropriate to restructure and reduce the number of the Agency's major operating divisions from three to two. In conjunction with the restructuring, two departmental manager positions are being eliminated. Your position is one of those which will be eliminated through the reduction in force process.

The letter also notified Petitioner about benefit options and his veterans preference rights. (Ex. 20.)

18. The Petitioner asked Yanisch if there were other positions for which he could apply. She told him there were not and that she wanted a smaller agency. Yanisch did make calls to people outside the agency concerning the open division director positions.

19. Since assuming the additional duties of Petitioner's position, Calvert has re-allocated project assignments within the Business Development Department. (Ex. 22.) Calvert has assigned as back-ups to her position and as "lead workers" four senior employees in the department - Phil Handy, Richard Victor, Jim White and Bill Tetzlaff, all of whom are senior to Petitioner by date of permanent hire. (Exs. 16, 17.)

20. The new Director of the Economic Development Division, Terrell Towers (“Towers”) has assumed an oversight and management role with respect to a small portion (approximately 10%) of Calvert’s project overload. (Ex. 23.) Some of these projects had been the responsibility of Petitioner. (Ex. 27.) Towers has assumed this responsibility on an interim basis in order to acquaint himself with the development process at MCDA. Towers is an honorably discharged veteran.

21. Seniority at MCDA has been interpreted by that agency to mean duration of employment with the agency since the last date of permanent hire. The AFSCME contract, which does not apply to managers, defines seniority as follows:

Seniority is defined as a permanent employee’s length of continuous service with the employer in a permanent position since his/her last hiring date. *Last hiring date* means the date upon which an employee first started work for and at the direction of the employer, since which he or she has not quit, retired or been discharged. . . .

(Ex. 30.) The provisions of the union contract are usually passed along to unrepresented employees. The personnel policy for unrepresented employees provides at Section 3.08 that personnel decisions are to be made on the basis of merit and efficiency, but where all factors are reasonably equal among employees, the action shall be based upon seniority. Seniority is not defined in the personnel policy. Not all non-union personnel decisions have been based upon seniority, however. (Ex. 29.)

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. That the Notice of Hearing issued by the Department of Veterans Affairs was proper and that all substantive and procedural requirements of law and rule have been met.

3. Petitioner’s petition to the Commissioner of Veterans Affairs was timely.

4. Petitioner is an honorably discharged veteran entitled to the protections of Minn. Stat. § 197.46, the Veterans Preference Act.

5. That the MCDA is a political subdivision of the State of Minnesota for the purposes of Minn. Stat. § 197.46.

6. Minn. Stat. § 197.46 prohibits removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing. The burden of proof is upon Petitioner to prove by a preponderance of the evidence that he was terminated in violation of Minn. Stat. § 197.46.

7. Public employers may abolish positions notwithstanding the Veterans Preference Act if the abolition of a position is in good faith. *State ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (1923); *Young v. City of Duluth*, 386 N.W.2d 732 (Minn. 1986). Respondent’s claim

that Petitioner's position was abolished in good faith is an affirmative defense for which Respondent has the burden of proof.

8. That the Petitioner was removed from his position without a hearing upon due notice and stated charges for purposes of Minn. Stat. § 197.46.

9. Petitioner was not terminated for incompetency or misconduct.

10. Respondent MCDA abolished Petitioner's position in good faith due to a legitimate plan of re-organization.

11. Respondent has not denied Petitioner rights provided to him by Minn. Stat. § 197.46.

12. These Conclusions are made for the reasons set out in the Memorandum which follows which is incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Veterans Affairs order that the petition of Dennis E. Daniels by DENIED.

Dated this ___ of June, 1995.

GEORGE A. BECK
Administrative Law Judge

Reported: Tape recorded - no transcript prepared.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to served its final decision upon each party and the Administrative Law Judge by first class mail.

-
-

MEMORANDUM

Under Minn. Stat. § 197.46, no veteran employed by a city or other political subdivision of the state may be removed from his employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. However, in *State ex rel. Caffrey v. Metropolitan Airports Commission*, 246, N.W.2d 637, 639 (Minn. 1976), the Minnesota Supreme Court held that the statute does not prevent a public employer from terminating the employment of a veteran by abolishing the veteran's position, if the action

abolishing the position is taken in good faith and for some legitimate purpose, and is not a mere subterfuge to oust the veteran from his position.

Whether the abolishment of the position was done in good faith is a question of fact. *State ex rel. Niemi v. Thomas*, 223 Minn. 435, 27 N.W.2d 155, 157 (Minn. 1947). The *Thomas* Court noted that the question of whether the village council in that case acted in good faith was a fact question, “and if the evidence supports the finding of good faith the finding should be sustained.” *Thomas, supra*, 27 N.W.2d at 157. The language used by the Court in that case implies that the burden of proof is on the Respondent here. Placing the burden of proof on the Respondent is consistent with the general rule that a party relying on a statutory exception or exemption has the burden of bringing himself within it. See, 31A C.J.S., Evidence § 104 n.72, p. 173.

The employer’s good faith in abolishing the Petitioner’s position is demonstrated by a series of facts. First of all, this is not a case in which the employer is seeking to dismiss an employee with performance problems by abolishing his position. The record is clear that Mr. Daniels had a very good performance record. Additionally, the record demonstrates that the MCDA was being criticized for its lack of focus and financial responsibility, had a need to downsize due to funding, and had developed a rational plan to make the Agency “smaller and smarter”. The Agency had been criticized during the 1993 election as being ineffective, wasteful and lacking focus. The Agency therefore, prior to Ms. Yanisch being hired, prepared a plan anticipating organizational changes which was then approved in mid-November of 1994 by the MCDA Board of Commissioners.

Yanisch became the Executive Director on November 28, 1994, with an announced intent to make the Agency more focused, more accountable and more financially responsible. The Agency’s common project opening cash balances together with the estimates through the end of the decade clearly indicate a need to reduce costs. (Ex. 3.) The plan which Yanisch developed eliminated three management positions resulting in an estimated savings of \$200,000. She eliminated the Finance Division as a separate division and placed the finance function within the two remaining major operating divisions. The Petitioner’s position was eliminated and all of the duties were assigned to another manager. A few of those duties were reassigned to Terrell Towers in order to allow him to become familiar with the development process at the Agency. The plan which Yanisch implemented is rationally related to the goals of reducing overlap within the Agency and is also consistent with the possibility of a decrease in downtown activities.

The original case dealing with the good faith abolishment of position exception to the Veterans Preference Act was *State ex rel Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (1923). In that case, the court noted:

The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes for bidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of the appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for

some legitimate purpose, and is not a mere subterfuge to oust him from his position. The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment notwithstanding the so-called Veterans Preference Act.

193 N.W. at 32. The record supports the conclusion that the elimination of Mr. Daniels' position was done for a legitimate purpose, namely a plan of reorganization and cost reduction, and was not simply a subterfuge designed to remove him from his position without establishing just cause for removal.

The Petitioner argues, however, that the Agency's actions violate the veterans preference law as construed by the Supreme Court in *Young v. City of Duluth*, 386 N.W.2d 732 (Minn. 1986). In that case, a veteran's position as director of a job-training program funded by CETA was eliminated upon a reduction in CETA funding. The veteran's job duties were transferred to other city employees who were not veterans and who were less senior. The city's goal was to have fewer employees performing the administrative functions of the program in order to save funds. The main issue in *Young* was whether or not the employer was required to give the petitioner notice of his veterans preference rights. However, the court also observed that:

If the city merely reassigned Young's duties to non-veteran employees less senior than he, his position was not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans Preference Act is applicable to cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the Act exists for such situations. Thus, veterans have a preference over non-veteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to need such duties performed.

386 N.W.2d at 738-39. The record is clear that the Petitioner's duties were reassigned to a non-veteran, Ann Calvert. The Petitioner argues that she is less senior than he because she has been a manger only since 1993 while Mr. Daniels has been a manager at MCDA since 1986. Ms. Calvert, however, has seniority over the Petitioner based on the date of her respective permanent hire. She was hired by MCDA in 1975. Mr. Daniels was employed in 1986 although he was briefly with MCDA's predecessor agency from 1962 to 1965. Since seniority is normally defined as a permanent employee's length of continuous service (Findings of Fact No. 21), Ms. Calvert is more senior in her permanent employment with MCDA.

The Petitioner asserts that MCDA has no policy regarding seniority which has been consistently implemented. Its personnel policy for unrepresented employees indicates that personnel decisions are to be made on the basis of merit and efficiency, but where all factors are equal among employees, the action shall be based upon seniority. Seniority is not defined in the policy. Seniority is defined in the union contract. A number of decisions by the Agency in relation to its managerial positions have not been done on the basis of seniority. However, the record contains no evidence as to whether or not factors were reasonably equal among employees in those situations. It cannot be concluded, therefore, that the Agency did not apply its rule consistently.

At any rate, the consistency of the application of the seniority rule is not the main focus in this case. The question is whether the veterans preference law as interpreted through case law has been violated. In that regard, a crucial factor is whether or not Mr. Daniels was senior to Ms. Calvert. The record indicates that he was not. Accordingly, the Petitioner cannot take advantage of the rule in the *Young* case which found a lack of good faith where duties were reassigned to non-veteran employees with less seniority. The Petitioner offers no authority for his argument that seniority should be applied on a “positional” basis rather than on the hiring date basis.

In *Caffrey vs. Metropolitan Airports Commission*, 310 Minn. 480, 246 N.W.2d 637 (1976), the Supreme Court found that the abolishment of the position of Director of Public Affairs was not done in good faith. The facts indicated that the employer was dissatisfied with the performance of the director. The court indicated that a factor to be considered in making this decision was whether or not the record demonstrated economic savings to the employer or any substantial change in the operation of the public affairs department. 246 N.W.2d at 641. In *Caffrey*, the employer had been unable to demonstrate either. In this case, the record shows an economic savings from elimination of three positions. Although that savings may be affected by the costs of the Agency’s transition plan for laid off employees, the savings still seem fairly clear cut. Additionally, the record demonstrates a significant change in the operation of the Agency through its reorganization. (Finding of Fact No. 11.) This is not a situation as in *Caffrey*, where a position is eliminated in order to remove an employee with performance problems. MCDA has carried its burden of proof to show that it abolished the Petitioner’s position in good faith and has therefore established an affirmative defense to Petitioner’s claim.

G.A.B.